

SERVED: March 30, 1993

NTSB Order No. EA-3833

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1993

_____)	
PAUL H. BARTH,)	
)	
Applicant,)	
)	
v.)	
)	Docket 000-EAJA
JOSEPH DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge Jimmy N. Coffman, issued on April 15, 1991.¹ The law judge dismissed, for lack of jurisdiction, respondent's application for Equal Access to Justice Act (5 U.S.C. 504, EAJA) fees. We deny the appeal.

The question before us is straightforward: may attorney fees

¹The initial decision is attached.

and expenses incurred in connection with defense against a Notice of Proposed Certificate Action (NOPCA) be recovered, when the Administrator withdraws the NOPCA and never issues an order of suspension? We are compelled to conclude that we are without authority to make any EAJA award.

Our rules, as relevant, provide as follows:

49 C.F.R. 826.3 Proceedings covered.

(a) The Act applies to certain adversary adjudications conducted by the Board. These are adjudications under 5 U.S.C. 554 in which the opposition of the FAA is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Proceedings to grant or renew certificates or documents, hereinafter referred to as "licenses," are excluded, but proceedings to suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For the Board, the type of proceeding covered includes aviation enforcement cases appealed to the Board under section 609 of the Federal Aviation Act (49 U.S.C. 1429).

(b) The Board may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Board's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the procedure is covered will then be an issue for resolution in proceedings on the application.

Applicant has used the procedure in (b) to bring this application before us, and argues that the language of this section reflects the purposes of EAJA, which contemplates relief in this case. He argues that the proceeding should be considered an adversary adjudication because both parties were represented by counsel, discovery was conducted, and a settlement conference was held. We cannot agree, however invalid we might view the

Administrator's pursuit of this matter.

Applicant ignores the fact that the term "adversary adjudication" is specifically defined in EAJA (5 U.S.C. 504(b)(1)(C)), as pertinent, as an adjudication under 5 U.S.C. 554 (of the Administrative Procedure Act, APA) in which the position of the United States is represented by counsel or otherwise, but excluding an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license.

Here, the United States was represented by counsel, and this was not a rate or licensing matter. However, an adjudication under section 554 of the APA is "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Absent issuance of an order of suspension, an appeal to this Board, and a hearing on the record, applicant has not been a party to the required section 554 adjudication.² Thus, under the clear wording of the statute, EAJA does not apply here.

The expansive language of section (b) was developed by the Administrative Conference of the United States (ACUS) as a part of model EAJA rules to be adopted and modified, as necessary, by affected agencies. With regard to the question before us here, ACUS noted that "exactly what proceedings are encompassed by this language [i.e., adjudications under section 554] has long been a

²See 49 C.F.R. 826.3(a) ("aviation enforcement cases appealed to this Board").

difficult legal question." Model Rules for Implementation of the Equal Access to Justice Act, 46 Federal Register 32900 (June 25, 1981). Thus, section (b) was drafted to ensure that proceedings would not be excluded because they had not earlier been identified as section 554 cases. By no stretch of legal analysis can the consultation and settlement meeting process identified by applicant be termed a section 554 on-the-record hearing for purposes of qualifying for EAJA fee recovery.³

ACCORDINGLY, IT IS ORDERED THAT:

Applicant's appeal and motion for leave to supplement his EAJA application are denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

³In view of this conclusion, we need not address applicant's motion to supplement his application.